COURT MARTIAL

Citation: *R v Lévesque,* 2014 CM 3012

Date: 20140722
Docket: 201402

Standing Court Martial

Canadian Forces Base Bagotville
Bagotville, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal N.P. Lévesque, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

(Orally)

[1] Corporal Lévesque, having accepted and recorded a plea of guilty in respect of the first and third charges on the charge sheet, the Court now finds you guilty of both offences. Given that the second and fourth charges were withdrawn, there are no other charges for the Court to deal with.

[2] It is now my duty as the military judge who is presiding at this Court Martial to determine the sentence to be imposed on Corporal Lévesque.

[3] The military justice system constitutes the ultimate means to enforce discipline, which is a fundamental element of military activity in the Canadian Forces. The purpose of this system is to prevent misconduct, or in a more positive way, to promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusty and reliable manner, successful missions. It also ensures that public order is maintained and that those who are subject to the Code of Service Discipline are punished in the same way as any other person living in Canada. In *R v*

Généreux, [1992] 1 SCR 259, at page 293, the Supreme Court of Canada recognized the following:

> To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently.

It also noted that in the particular context of military justice,

> [b]reaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.

[4] However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of a case. In other words, any sentence imposed by a court must be adapted to the individual offender and constitute the minimum necessary intervention since moderation is the bedrock principle of modern theory of sentencing in Canada.

[5] In this case, the prosecutor and the offender's defence counsel made a joint submission on the sentence to be imposed. They recommended that the Court sentence Corporal Lévesque to detention for a period of five days. Although the Court is not bound by this joint recommendation, it is generally accepted that the sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest. On this point, see *R v Taylor*, 2008 CMAC 1, at paragraph 21. I should also mention that both parties suggested that the Court suspend the sentence of detention.

[6] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

(a) to protect the public, which includes the Canadian Forces;

(b) to denounce unlawful conduct;

(c) to deter the offender and other persons from committing the same offences;

(d) to separate offenders from society, where necessary; and

(e) to rehabilitate and reform offenders.

[7] When imposing sentences, a military court must also take into consideration the following principles:

(a) a sentence must be proportionate to the gravity of the offence;

(b) a sentence must be proportionate to the responsibility and previous character of the offender;

(c) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(d) an offender should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate in the circumstances—in short, the Court should impose a sentence of imprisonment or detention only as a last resort, as was established by the Court Martial Appeal Court and the Supreme Court of Canada; and

(e) lastly, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[8] I find that in the particular circumstances of this case, sentencing should focus on the objectives of denunciation and general deterrence. It should be noted that general deterrence should deter not only the offender, but also any other Forces member who might be tempted to commit similar or comparable offences.

[9] Corporal Lévesque had been with 1 Canadian Field Hospital at Canadian Forces Base Petawawa, Ontario, since 12 March 2012. In May 2013, in view of his medical restrictions, Corporal Lévesque only had to be at work from 1300 to 1530 hours, Monday to Friday.

[10] On 6 May 2013, Corporal Lévesque did not report for work at 1300 hours as scheduled. A member of his chain of command contacted him and told him to report the next day.

[11] On 7 May 2013, he had still not reported for work at 1300 hours. He was contacted again and ordered to report for work. In the evening of 7 May 2013, the commanding officer issued a warrant for Corporal Lévesque's arrest. On 8 May 2013, Corporal Lévesque did not report for a medical appointment that morning at the Petawawa base hospital. That same day, he did not report for work at 1300 hours, at the place where he was supposed to perform his duties. That afternoon, he was therefore arrested pursuant to the arrest warrant that had been issued. That same evening, he was released under certain conditions, including the requirement to report to the Duty Centre of 1 Canadian Field Hospital from Monday to Friday, at 1300 hours and at 1500 hours, unless authorized not to do so. A member of his chain of command made sure that he understood that his presence was required at 1 Canadian Field Hospital at 1300 hours the next day, 9 May 2013.

[12] On 9 May 2013, Corporal Lévesque had still not reported to 1 Canadian Field Hospital as required. The military police arrested him that day. The Unit Custody Review Officer did not release Corporal Lévesque.

[13] On 14 May 2013, a hearing concerning the review of Corporal Lévesque's detention was held before a military judge in Petawawa, and he was released under certain conditions. On 15 November 2013, Corporal Lévesque was transferred to Canadian Forces Base Bagotville, where he continued receiving medical treatments close to his family.

[14] It should be borne in mind that the types of offences that are before the Court are directly related to certain ethical obligations, including those related to responsibility and reliability. For non-commissioned members and officers alike, being trustworthy and reliable at all times is more than essential for the accomplishment of any task or mission in an armed force, whatever the function or the role one has to perform.

[15] Now, in arriving at what the Court considers a fair and appropriate sentence, the Court has considered the following mitigating and aggravating factors:

(a) First, there is the objective seriousness of the offences. You have been charged with two offences, one under section 90 of the *National Defence Act*, and another under section 101.1 of the *National Defence Act*, both of which are punishable by imprisonment for less than two years or less punishment;

(b) There is also the subjective seriousness of the offence, and I note two factors in that regard:

i. First, there is your rank of corporal and your experience. You have been in the Canadian Forces for several years now. When you decided not to report as scheduled and as you undertook to do because it was a condition, you were well aware of the consequences that this could have for you. I do not deny that you did this in a certain context, but as a member of the Forces, you knew the consequences and were aware of the importance of reporting and of the significance of failing to do so, given your knowledge of military life and the importance of being reliable. You knew full well what you were doing at the time;

ii. There is also the context. I understand from the circumstances that the unit had taken a progressive approach towards you. It gave you warnings and adopted a primarily administrative approach to advise you of the consequences. All this suggests to the Court that there was a form of premeditation, since you did not miss work once, but several times previously, such that it was not in any way spontaneous or accidental when you failed to

> report as required. In the end, you were not there, and you did it deliberately, with full knowledge of what the consequences would be.

[16] Now, the Court also takes into consideration the following mitigating factors:

(a) First, there is your plea of guilty. Your admission of guilt is a clear and genuine sign of remorse, but above all, it shows that you take full responsibility for your actions in the circumstances;

(b) The Court also notes the lack of any notes in your conduct sheet regarding similar offences or any other sort of offence. I note that there is no indication that you have committed any service offence or criminal offence of the same nature in relation to the events before the Court; in fact, you have no past convictions, and this plays in your favour;

(c) I also note the fact that you had to face this court martial proceeding, which is a special event that, in my view, had a deterrent effect not only on you, but also on all the other members of the military community;

(d) I also note that this was an isolated incident. This is rather unusual behaviour for you, given all that you told me today, and there is also the medical situation that explains why you may have shown poor judgment at the time of the offences; and

(e) Indeed, I must also note these medical circumstances as a mitigating factor, and I think that they played a certain role in how you committed these offences.

[17] Counsel filed a case in this Court, namely, *R v Crossman*, 2013 CM 1004. I took the time to quickly review the case law involving sentences for offences that are identical to those before the Court today, that is, absence without leave and failing to comply with a condition. To get a more general idea—because counsel, as I explained, made a joint submission, but one including detention—but in the circumstances, I was curious to know more specifically what this was all about, so instead of coming back into court and asking counsel to give me that, I did it myself. These are not identical circumstances, I realize, but I note these, among others: *R v Nicholson*, 2009 CM 1015, in which the sentence was dismissal from Her Majesty's service; *R v Billinsgley*, 2009 CM 2016, where it was detention and dismissal*; R v Rozell*, 2004 CM 59, where it was imprisonment and a fine; *R v O'Toole*, which I had mentioned, 2012 CM 1010, which is the only case that I saw that refers to a reprimand and a fine; *R v Heideman*, this is one of my decisions, 2013 CM 3004, a joint submission, I passed a sentence of dismissal from Her Majesty's service; *R v Coombs*, 2011 CM 3006, another one of my decisions, in which I accepted the joint submission of the parties, 23 days' detention, that is, 35 days less 12 days in pretrial custody, and a fine. And when I put all these circumstances in their place, and I will tell you that my research was very cursory, I

understand that when someone is absent without leave and breaches a condition, as was noted by the parties, the moral blameworthiness is slightly greater with respect to the combination of these two offences. What I see—it's certain that it's often cases where there is more than one offence or the periods of absence without leave could be a little longer, but there are also conditions that were breached—the combination of these factors lead me to believe that imprisonment, dismissal and detention were used more often than reprimands or fines where we had a combination of those offences.

[18] It should be noted that detention, as suggested by the parties, and I will paraphrase Note A of article 104.09 of the *QR&O*, detention is a punishment that seeks to rehabilitate service detainees by trying to re-instill in them the habit of obedience in a military setting, through a regime of special training in detention that emphasizes the institutional values and skills that are specific to the Canadian Forces.

[19] Furthermore, when people are in detention, they may, depending on how long they are detained, evidently, and I do not have any proof, but they may nevertheless have access to specialized care or counselling programs if need be. In addition, a sentence of detention, since it is intended to rehabilitate, usually entails that the member be returned directly to his or her unit once the sentence has been served.

[20] So this is the goal of rehabilitation, and this is how I understand it, in this context in which the parties made their joint submission, that is, there was a conduct deficiency, one that is more than absence without leave, the offender was warned, then subjected to conditions after being told that he would be charged, and thus was formally notified, and despite this, the reaction was not what is expected of any Forces member, that is, to submit to the conditions and to a special condition.

[21] The joint submission may seem severe in the circumstances, but I find it to be reasonable, however, given the combination of offences and their nature; the circumstances, as noted by the prosecution, including the context, are not something that occurred suddenly all at once, but the unit worked on those aspects before arriving at something more formal in terms of charges. There are also the principles and objectives I was talking about, that is, denunciation and general deterrence, which are met by detention, and also a sort of parity, as I was saying; it is something that is nonetheless punished severely, where we are talking about the combination of the two offences. Therefore, in these circumstances, the suggestion in the form of detention does not seem unreasonable to the Court.

[22] In terms of the duration, obviously, this has another impact. I find the pretrial custody that was done for a period of five days and what is suggested, five days of detention, does not seem unreasonable to me; on the contrary, it is a very short period of detention that seems justified in the circumstances. Therefore, the Court accepts counsel's joint submission on sentencing Corporal Lévesque to five days' detention, considering that this is not contrary to the public interest and will not bring the administration of justice into disrepute.

[23] Now, that said, the parties also submitted to me the fact that I should suspend the sentence of detention. Section 215 of the *National Defence Act* reads as follows:

> Where an offender has been sentenced to imprisonment or detention, the carrying into effect of the punishment may be suspended by the service tribunal that imposed the punishment.

[24] I would simply remind you that this section is in Section 8 of the Code of Service Discipline in the *National Defence Act*, which contains the provisions applicable to imprisonment and detention. The suspension of a punishment of imprisonment is a discretionary and exceptional power that may be exercised by a service tribunal, including a court martial. This power is different from the power provided by section 731 of the *Criminal Code*, which allows a civilian court of criminal jurisdiction to suspend the passing of sentence while subjecting an offender to a probation order, or the power provided by section 742.1 of the *Criminal Code* on imprisonment with conditional sentencing, which allows a civilian court of criminal jurisdiction to sentence an offender to serve a punishment of imprisonment in the community.

[25] As I noted in a series of decisions—and I am referring to the decisions in *R v Paradis*, 2010 CM 3025; *R* v *Zammitti*, 2010 CM 3024; *R* v *Wilcox*, 2011 CM 3012; *R* v *Masserey*, 2012 CM 3004; and *R* v *Vézina*, 2013 CM 3015, decisions that I have rendered since 2010, 2011, 2012, 2013, and I have another here in 2014—the *National Defence Act* does not set out any particular criteria for applying section 215.

[26] My interpretation of this, and as other military judges have interpreted it, is such that if the accused demonstrates, on a balance of probabilities, that his or her particular circumstances or the operational requirements of the Canadian Forces justify the necessity of suspending the sentence of imprisonment or detention, the Court will make such an order. But on the other hand, before coming to this conclusion, the Court will have to determine whether the suspension of this sentence will undermine public confidence in the military justice system as a component of the Canadian justice system in general. Therefore, there has to be proof on a balance of probabilities of special circumstances.

[27] I gather from the evidence, and particularly from the testimony of Corporal Lévesque, that there was a change in environment that was made to encourage his rehabilitation, a change in environment seeking, among other things, to offer better family support, which since November 2013 has brought about an appreciable improvement in medical terms, particularly in terms of Corporal Lévesque's psychological condition, and which allows him to state today in court that he plans to eventually return to his career on a full-time basis. He has been undergoing rehabilitation without any problems, including disciplinary problems, since November 2013. And I must note, Corporal Lévesque, that since that incident that occurred on 9 May 2013, which your counsel referred to as being perhaps a bit when you hit rock bottom, if you will, you have succeeded in reintegrating yourself to a certain extent into military life, and you plan to reintegrate yourself fully into military

life and are taking, as I understand, all the necessary steps to do so. In my opinion, all these facts are evidence of exceptional circumstances, and it has been proven on a balance of probabilities that it would be appropriate in the circumstances to suspend the sentence of five days' detention. And in my opinion, this suspension, having regard to all the circumstances that are known today that you explained before this Court, Corporal Lévesque, would not undermine public confidence in the military justice system as a component of the Canadian justice system in general. Essentially, I do not think that the public would begin doubting the effectiveness of the military justice system if you did not serve your sentence, given the circumstances. Now, this is something that is very specific here and that applies to this case.

[28] I hope that you will continue your efforts because you have shown that you are persistent and have a desire to put the incident behind you, and that the incident that brought us here today was an exception; to date you have proved this, and I wish you the best of luck in future because it is not over, and you will have to continue to show courage and determination. And I hope your family will continue to support you in your efforts.

FOR THESE REASONS, THE COURT:

[29] **FINDS** Corporal Lévesque guilty of the offences set out in the first and third charges.

[30] **SENTENCES** the offender to detention for a period of five days.

AND

[31] **SUSPENDS** the carrying into effect of the punishment of detention for a period of five days.

Counsel:

Major J.E. Carrier, Canadian Military Prosecution Service
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